Appendix

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

K. B. & J. YOUNG'S SUPER MARKETS, INC.,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

No. 20,827

[April 28, 1967]

On Petition to Review and Petition to Enforce an Order of the National Labor Relations Board

Before: HAMLIN, JERTBERG and MERRILL, Circuit Judges

MERRILL, Circuit Judge:

Petitioner seeks review of an order of the National Labor Relations Board, and the Board cross-petitions for enforcement of its order. 157 N.L.R.B. No. 17 (1966). At issue is the question whether petitioner, as purchaser of a retail food marketing enterprise, became bound by certain collective bargaining obligations of its predecessor.

Hob Nob Stores, Inc., a large retail grocery chain, owned three supermarkets in or near Bakersfield, California, operated under the name of "Kelley's Markets." In April 1964, William and John Young, brothers, bought the three stores. Just prior to the sale, at the direction of the Youngs, all Kelley's employees were notified that they were discharged effective on the sale date. The sale was completed, the stores shut down for one day, then reopened, still as "Kelley's Markets." Shortly thereafter, petitioner was organized to operate the stores in its own name. While some innovations in methods of handling and marketing merchandise were introduced, essentially the same business was operated in a similar fashion, at the same locations, and the size and duties of the work force did not change substantially.

The meat departments at Kelley's had been covered by a standard collective bargaining agreement with Butchers Union Local 193, Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO, which by its terms was effective until January 1965.[1] The union demanded recognition by petitioner of its representative status and of the agreement. This was refused by petitioner on the ground of an alleged good faith doubt that the union represented a majority of petitioner's meat department employees.

At the union's behest the Board filed a complaint against petitioner, charging that it had caused Hob Nob to discharge its union employees, that it had failed to recall the employees, that it was the "successor" to Hob Nob for the purposes of the National Labor Relations Act, and that it had refused to bargain with Local 193.

The Trial Examiner and the Board found that there was substantial continuity of identity in the business enterprise, and that petitioner had caused the discharges for unlawful reasons, to evade bargaining obligations with the union. Petitioner was held to be the "successor" to Hob Nob; accordingly the discharges were found to violate §8(a)(3) of the N.L.R.A., and the refusal to bargain to violate §8(a)(5).[2] The remedy ordered was reinstatement with back pay for the discharged personnel and recognition of and bargaining with the union.[3]

Petitioner contends that since a substantial change in the personnel of the work force coincided with the sale, it was not bound to recognize the union as bargaining representative under *NLRB v. John Stepp's Friendly Ford, Inc.*, 338 F.2d 833 (9th Cir. 1964).

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[1]The standard agreement included a Union Shop clause, an acquisition clause providing for jurisdiction over meat departments or markets acquired by the employer in the future, and a change of ownership clause providing for application of the agreement to transferee of the employer. The latter provided for thirty days probationary period for the retention of old employees, and for the survival of seniority, vacation and sick leave credit in any event.

[2]49 Stat. 452 (1935), as amended, 29 U.S.C. §158(a)(3), (5) (1964). Both activities were found to violate 29 U.S.C. §158(a)(1).

[3]The Board did not rule on the General Counsel's contention that petitioner should also be ordered to recognize the existing collective bargaining agreement in its entirety, for the reason that the union did not press this question and expressed a desire to negotiate a new contract.

We cannot agree. Here the record clearly supports the Board's finding that petitioner caused the mass discharge of unit personnel for antiunion reasons. This distinguishes the present case from *Stepp's Friendly Ford.* There the Board merely sought to compel the purchaser to recognize and bargain with the old union, despite a substantial change in the identity of the work force. There was no finding that the discharge of the old employees constituted an unfair labor practice and their reinstatement was not sought. Where, as here, the old employees have been wrongfully discharged, their reinstatement is an appropriate remedy for the unfair labor practice. With such reinstatement ordered, continuity in the identity of the work force may be presumed to follow and an order to recognize and bargain with the union as representative of the present work force is appropriate.

Petitioner contends that the mass discharge was of no significance as an unfair labor practice, since the sale in any event would have caused an automatic termination of the old employment relationship.[4]

We find no merit in this contention. *John Wiley & Sons v. Livingston,* 376 U.S. 543, 551 (1964), establishes that where there is substantial continuity of identity in the employing enterprise a change in ownership does not, by operation of law, automatically terminate all rights of the old employees[5] and that such rights

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[4]Petitioner's position is that if an unfair labor practice is to be found in its failure to continue employment of the old employees (or to offer them reinstatement) it must be through a discriminatory refusal to hire. It is well established that §8(a)(3) discrimination refers as well to applicants for employment as to existing employees. *Phelps Dodge Corp. v. NLRB,* 313 U.S. 177 (1941); *Piasecki Afct. Corp. v. NLRB,* 280 F.2d 575 (3d Cir. 1960), *cert. denied,* 364 U.S. 933 (1961). In the present case there is some evidence of discriminatory refusal to hire, but the Board has made no general finding of such, relying solely on the discharge.

[5]The Supreme Court stated:

> "While the principles of law governing ordinary contract would not bind to a contract an unconsenting successor to a contracting party, a collective bargaining agreement is not an ordinary contract." 376 U.S. at 550.

The Court also observed:

> "The objectives of national labor policy, reflected in established principles of federal law, require that the rightful prerogative of owners independently to rearrange their businesses and even eliminate

may remain the legitimate subject of dispute. Importantly included in such potentially bargainable issues, in our view, is continuity of employment, here expressly provided for in the collective bargaining contract with Hob Nob, see footnote 1, *supra*.

Since the right to continued employment does not automatically terminate on change in ownership, it must terminate by act of the parties and such acts accordingly become relevant. Under the circumstances we see no valid distinction between a discharge by petitioner and a discharge by Hob Nob at petitioner's behest on the eve of the changeover.

Petitioner protests that in determining the existence of substantial continuity of identity in the employing enterprise in the *Wiley* sense, continuity of employment is itself a relevant if not essential factor. We cannot agree under the facts of this case. Petitioner's argument amounts to a bootstrap contention that a discriminatory interruption of employment cannot be challenged since it did in fact occur.

The Board also found discriminatory discharges of two individuals who were not former Hob Nob employees: Imogene Brewton and Jack Baldwin. Petitioner contends that in these instances it was not unlawfully motivated, and that these discharges were made for legitimate business reasons. In our judgment the Board's findings in these respects are supported by substantial evidence on the record as a whole. *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951).

We conclude that the Board's order is entitled to enforcement. It is so ordered.

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themselves as employers be balanced by some protection to the employees • • •." 376 U.S. at 549.

While the immediate issue was the right to arbitration, the opinion states: "It would be inconsistent with our holding that the obligation to arbitrate survived the merger were we to hold that the fact of the merger, without more, removed claims otherwise plainly arbitrable from the scope of the arbitration clause." 376 U.S. at 554.

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DECREE

Before: Hamlin, Jertberg and Merrill, Circuit Judges.

This Cause came on to be heard upon the petition of K. B. & J. Young's Super Markets, Inc., to review and set aside a certain order of the National Labor Relations Board issued against petitioner on March 1, 1966, and upon cross-petition of the National Labor Relations Board to enforce said Order. The Court heard argument of respective counsel on January 3, 1967, and has considered the briefs and transcript of record filed in this cause. On April 28, 1967, the Court being fully advised in the premises, handed down its decision granting enforcement of the Board's Order. In conformity therewith, it is hereby,

Ordered, Adjudged And Decreed by the United States Court of Appeals for the Ninth Circuit that K. B. & J. Young's Super Markets, Inc., its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively with the Butchers Union Local 193, Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO, (hereinafter called the Union), as the exclusive representative of all its employees in the appropriate unit;

(b) Discriminating against any of its employees in regard to their hire or other tenure and condition of employment, thereby discouraging membership in the Union or any other labor organization;

(c) In any other manner interfering with, restraining or coercing its employees in the right to self-organization, to form labor organizations, to join or assist the Union, or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as authorized in Section 8(a)(3) of the National Labor Relations Act, (hereinafter called the Act).

2. Take the following affirmative action designed to effectuate the policies of the Act:

(a) Upon request bargain collectively with the Union as the exclusive representative of its employees in the previously described appropriate unit, with respect to rates of pay, wages, hours of work, and

other conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Offer all employees in the appropriate unit who had employee status in that unit as of April 20, 1964, and offer Jack Baldwin and Imogene Brewton, immediate reinstatement to the positions they held at the time of their respective discharges, without prejudice to their seniority and other rights and privileges, and make them whole for any loss of pay they may have suffered as a result of the discrimination against them, all in the manner set forth in the Section of the Trial Examiner's Decision, entitled "the remedy".

(c) Notify the above-named employees if presently serving in the Armed Forces of the United States, of their right to full reinstatement upon application in accordance with the Selective Service Act and the Universal Military Training and Service Act of 1948, as amended, after discharge from the Armed Forces;

(d) Preserve and, upon request, make available to the National Labor Relations Board or its agents all records necessary for the computation of backpay which may be due under this Decree.

(e) Post at its plant at Bakersfield, California, copies of the notice attached hereto and marked "Appendix." Copies of said notice to be furnished by the Regional Director of the Thirty-first Region, (Los Angeles, California), shall, after being signed by a representative of the Respondent, be posted immediately upon receipt thereof and maintained for a period

of 60 consecutive days thereafter in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(f) Notify the Regional Director for the Thirty-first Region, in writing, within 10 days from the date of this Decree, what steps Respondent has taken to comply herewith.

Endorsed, Decree filed and Entered
/s/ Wm. B. Luck
Wm. B. Luck
Clerk

A True Copy
Attest:
Wm. B. Luck
Clerk